

Defendant.

AMENDED JOINT CASE MANAGEMENT
STATEMENT, RULE 26(f)
REPORT, & ~~(PROPOSED)~~ ORDER

1 economic relationships. The basis of each claim is summarized below:

2 Patent Infringement – Plaintiff asserts that it is owner of all rights, title and interest in
3 United States Patent Nos. 7,044,896, 7,806,814, and 8,043,197 (“the patents-in-suit”). Plaintiff
4 contends that Defendants infringe the patents-in-suit by making, using, selling, offering to sell,
5 and/or importing into the United States fitness equipment under the names “3000 Equalizer,”
6 “3000 Stable,” “Military Gym Style,” “Military 1 in Trainer,” “Military 1.5 in Trainer,” “SST
7 Suspension Trainer,” “Titan 1 ½ in Wide Strap,” and “WOSS XT” (collectively “the WOSS
8 Products”). Plaintiff seeks injunctive relief, compensatory damages in an amount to be
9 determined at trial, treble damages and attorneys’ fees, pursuant to 35 U.S.C. §§ 284 and 285.

10 Trademark Infringement – Plaintiff asserts that it owns the registered trademark and
11 service mark SUSPENSION TRAINING. Plaintiff contends that Defendant has infringed
12 Plaintiff’s federally registered marks. Plaintiff seeks injunctive relief, compensatory damages,
13 costs and attorneys’ fees under 15 U.S.C. §§ 1114, 1116 and 1117.

14 Federal and State Unfair Competition – Plaintiff asserts that it owns the registered
15 trademark and service mark SUSPENSION TRAINING. Plaintiff contends that Defendant has
16 used confusingly similar imitations of Plaintiff’s federally registered marks and that such use is
17 likely to cause confusion, deception, and mistake by creating the false and misleading impression
18 that Defendant’s goods are manufactured or distributed by Plaintiff, or are associated with
19 Plaintiff, or have sponsorship, endorsement, or approval of Plaintiff. Plaintiff contends that
20 Defendant’s actions are a violation of 15 U.S.C. § 1125(a) and California Business and
21 Professions Code § 17200. Plaintiff seeks injunctive relief, compensatory damages,
22 disgorgement of profits, costs, and attorneys’ fees.

23 Tortious Interference with Prospective Economic Relationships – Plaintiff asserts that
24 there exists an economic relationship between Plaintiff and purchasers of exercise equipment and
25 a probability of future economic benefit to Plaintiff from these purchasers, and that Defendant
26 has acted to disrupt this relationship in the ways summarized above. Plaintiff seeks exemplary
27 and punitive damages.

28 Defendant has filed its Answer denying liability to Plaintiff and a Counterclaim, which

are summarized as follows:

Patents

Defendant asserts that Plaintiff's patents are invalid and not infringed. The purported invention(s) is(are) obvious and not novel. Defendant does not make, use, sell or import any products covered by any claim of the asserted patents and does not practice any methods covered by any claim of the asserted patents and does not induce others to do so or contribute to others doing so.

Trademark

Defendant asserts that Plaintiff's "marks" are invalid because they are generic or merely descriptive and do not operate to identify a single source, and to the extent Defendant uses any of the words in Plaintiff's "marks" they are used to truthfully describe its own products, and such use is classic fair use and not likely to cause confusion. Defendant's products are of superior quality and much lower price point., thereby further reducing likelihood of confusion. Moreover, Plaintiff is less than candid by referring to its single "registered ... mark" and to purported infringements of "marks". Plaintiff does have registrations of the same mark in three categories, two of which categories have absolutely nothing to do with the goods or services of Defendant. The foregoing comments refer therefore to the mark in Class 28.

Unfair Competition

Defendant asserts it has made no false or confusing statements of any kind, and that any damages are beyond speculative given the superior quality and lower price point of Defendant's goods.

Interference With Prospective Economic Advantage

Defendant asserts it has not committed and Plaintiff cannot prove any interference claim as alleged for several reasons including that the intent requirement is utterly lacking and because Defendant has committed no independent wrongful act that supports such a claim under California law. Moreover, damages from any such acts are completely speculative for the reasons set forth above.

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3 **3. Legal Issues**

4 *A brief statement, without extended legal argument, of the disputed points of law, including reference to specific*
5 *statutes and decisions.*

6 The legal issues to be addressed include:

- 7 1. Whether the Defendant makes, uses, sells, offers for sale and/or imports into the
8 United States, devices that infringe one or more claims of the patents-in-suit in violation of 35
9 U.S.C. § 271;
- 10 2. Whether the asserted claims of the patents-in-suit meet the conditions for patentability
11 and satisfy all of the requirements set forth in the patent laws, including without limitation the
12 provisions of 35 U.S.C. §§ 101, 102, 103, and/or 112;
- 13 3. The proper construction of the asserted claims;
- 14 4. Whether Plaintiff's SUSPENSION TRAINING trademark and service mark are valid
15 and protectable marks;
- 16 5. Whether Defendant has infringed Plaintiff's SUSPENSION TRAINING trademark
17 and service mark;
- 18 6. Whether Defendant's use of any words alleged by Plaintiff to constitute infringement
19 was a non-infringing nominative use or was a use made fairly and in good faith only to describe
20 the goods or services of Defendant, 15 U.S.C. § 1115.
- 21 7. Whether Defendant has engaged in actionable conduct likely to cause confusion,
22 deception and/or mistake among consumers;
- 23 8. Whether Defendant has engaged in acts that were designed to and which did disrupt
24 the relationship between Plaintiff and purchasers of exercise equipment; and
- 25 9. Whether any party is entitled to damages, costs, attorneys' fees and/or expenses.

26
27 **4. Motions**

28 *All prior and pending motions, their current status, and any anticipated motions.*

Plaintiff has filed, Defendant has filed its opposition to, and Plaintiff has filed its reply to, a motion to dismiss Defendant's First Amended Counterclaim. Previously, the following motions were filed in connection with this case:

Title of Motion	Date of Order Issued
Motion for leave to appear in Pro Hac Vice by Alain Villeneuve (Dkt. No. 8)	May 13, 2014 (Dkt. No. 10)
Motion for leave to appear in Pro Hac Vice by Michael J. Waters (Dkt. No. 9)	May 13, 2014 (Dkt. No. 11)
Motion to Dismiss Counterclaim filed by Plaintiff (Dkt. No. 20)	August 4, 2014 (Dkt. No. 27)
Motion to Dismiss Amended Counterclaim filed by Plaintiff (Dkt. No. 29)	September 26, 2014 (Dkt. No. 35)

The parties anticipate filing, at least, motions for summary judgment on infringement and validity; discovery motions, to the extent the parties cannot resolve a dispute; and pretrial and post-trial motions.

Defendants amended their counterclaim on August 8, 2014 and Plaintiff answered the amended counterclaim on October 7, 2014.

5. Amendment of Pleadings

The extent to which parties, claims, or defenses are expected to be added or dismissed and a proposed deadline for amending the pleadings.

Plaintiff has not amended its Complaint to date. Plaintiff presently has no plans to amend its Complaint, but reserves the right to do so in the event it obtains new information in the course of discovery.

6. Evidence Preservation

A brief report certifying that the parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information ("ESI Guidelines"), and confirming that the parties have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action. See ESI Guidelines 2.01 and 2.02, and Checklist for ESI Meet and Confer.

The parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information. Additionally, the parties have met and conferred pursuant to Federal Rule of Civil Procedure 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action.

7. Disclosures

Whether there has been full and timely compliance with the initial disclosure requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.

The parties exchanged Federal Rule of Civil Procedure 26(a)(1) initial disclosures on August 14, 2014, and such disclosures addressed the topics identified in Rule 26(a)(1)(A)(i)-(iv).

8. Discovery

Discovery taken to date, if any, the scope of anticipated discovery, any proposed limitations or modifications of the discovery rules, a brief report on whether the parties have considered entering into a stipulated e-discovery order, a proposed discovery plan pursuant to Fed. R. Civ. P. 26(f), and any identified discovery disputes.

No discovery has been taken to date.

Plaintiff will require discovery from Defendant on at least the following subjects: (i) the structure, function and operation of the WOSS Products; (ii) the Defendant's proposed construction of each asserted claim of the patents-in-suit; (iii) the Defendant's invalidity contentions and evidence in support of same; (iv) Defendant's use of SUSPENSION TRAINING and/or similar imitations thereof in the marketing and sale of its products; (v) Defendant's knowledge and intent in taking the actions complained of in the complaint; and (vi) the costs, revenue and profits to Defendant for each of the WOSS Products and products marketed and/or sold in connection with Defendant's use of SUSPENSION TRAINING and/or similar imitations thereof.

Defendant will require discovery from Plaintiff on at least the following subjects: (a) all instances of alleged actual confusion; (b) all instances of alleged interference with economic relationships; (c) [of the author of the patents in suit] the patent prosecution and meaning of terms ascribed during that process; (d) alleged damage.

1 The parties have agreed to the following modifications to the discovery rules imposed by
2 the Federal Rules of Civil Procedure:

3 1. Claims of Privilege or Work-Product Protection: Attorney-client privileged
4 documents, work product documents, and documents subject to any other privilege or immunity
5 (including electronically stored information) created after April 14, 2014 (the date the Complaint
6 was filed) need not be identified on a party's privilege log. Additionally, inadvertent production
7 of privileged or otherwise protected documents will not constitute grounds for waiver of
8 privilege or other protection.

9 2. Electronically Stored Information ("ESI"): The parties intend to negotiate and reach
10 agreement on electronic discovery and production procedure.

11 3. Method of Service: All papers not required to be filed may be served by email,
12 provided that the file size of each individual email does not exceed 9 MB.

13 4. Protective Orders: The parties will meet and confer and attempt to agree on
14 appropriate protection of discovery materials as and should the need arise.

15
16 9. Class Actions

If a class action, a proposal for how and when the class will be certified.

17
18 Not applicable.

19 10. Related Cases

20 *Any related cases or proceedings pending before another judge of this court, or before another court or*
21 *administrative body.*

22 There are no presently known related cases or proceedings pending before another judge
23 of this Court or before another court or administrative body.

24 11. Relief

25 *All relief sought through complaint or counterclaim, including the amount of any damages sought and a description*
26 *of the bases on which damages are calculated. In addition, any party from whom damages are sought must describe*
27 *the bases on which it contends damages should be calculated if liability is established.*

28 Plaintiff seeks the following relief for each of its claims:

1 1. Patent Infringement – Plaintiff seeks injunctive relief pursuant to 35 U.S.C. § 283.
2 Plaintiff seeks compensatory damages pursuant to 35 U.S.C. § 284 in an amount that presently
3 cannot be ascertained but that will be determined at trial. Plaintiff also seeks a trebling of
4 damages pursuant to 35 U.S.C. § 284, and attorneys’ fees pursuant to 35 U.S.C. § 285.

5 2. Trademark Infringement – Plaintiff seeks injunctive relief and to recover
6 Defendant’s profits, actual damages, enhanced profits and damages, costs, and reasonable
7 attorneys’ fees under 15 U.S.C. §§ 1114, 1116 and 1117.

8 3. Federal Unfair Competition – Plaintiff seeks injunctive relief and to recover
9 Defendants’s profits, actual damages, enhanced profits and damages, costs, and reasonable
10 attorneys’ fees under 15 U.S.C. §§ 1125(a), 1116 and 1117.

11 4. State Unfair Competition – Plaintiff seeks injunctive relief, as well as
12 disgorgement of all Defendant’s profits associated with the alleged unfair competition pursuant
13 to California Business and Professions Code § 17203.

14 5. Tortious Interference with Prospective Economic Relationship – Plaintiff seeks
15 actual damages, as well as exemplary and punitive damages.
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18 Defendant requests judgment in its favor on all of Plaintiff’s claims, together with
19 judgment in its favor on its counterclaim. Defendant seeks costs of suit and its attorney fees both
20 under “bad faith litigation” and other applicable law.

21 12. Settlement and ADR

22 *Prospects for settlement, ADR efforts to date, and a specific ADR plan for the case, including compliance with ADR*
23 *L.R. 3-5 and a description of key discovery or motions necessary to position the parties to negotiate a resolution.*

24 The parties have submitted ADR certifications. The parties also have conferred, in July
25 2014, on ADR issues per ADR L.R. 3-5, and have participated to an ADR Telephone Conference
26 on September 29, 2014. The next ADR Telephone Conference is set for December 9, 2014.

27 Plaintiff submits the parties are both willing to engage in settlement discussions and
28

1 believe that formal ADR will be most productive after the parties have exchanged claim
2 disclosures, infringement contentions and invalidity contentions.

3 Defendant submits that it has invited Plaintiff to enter into early settlement discussions, to
4 which Plaintiff has stated a willingness based on conditions unacceptable to Defendant.

5
6 **13. Consent to Magistrate Judge For All Purposes**

7 *Whether all parties will consent to have a magistrate judge conduct all further proceedings including trial and entry
8 of judgment. YES X NO*

9 **14. Other References**

10 *Whether the case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on
11 Multidistrict Litigation.*

12 The parties do not believe this case is suitable for reference to arbitration, a special
13 master, or the Judicial Panel on Multidistrict Litigation.

14 **15. Narrowing of Issues**

15 *Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial
16 (e.g., through summaries or stipulated facts), and any request to bifurcate issues, claims, or defenses.*

17 The parties have not yet identified any issues that may be narrowed by agreement or
18 motion.

19 **16. Expedited Trial Procedure**

20 *Whether this is the type of case that can be handled under the Expedited Trial Procedure of General Order 64,
21 Attachment A. If all parties agree, they shall instead of this Statement, file an executed Agreement for Expedited
22 Trial and a Joint Expedited Case Management Statement, in accordance with General Order No. 64, Attachments B
23 and D.*

24 The parties do not believe that this case may be handled on an expedited basis.

25 **17. Scheduling**

26 *Proposed dates for designation of experts, discovery cutoff, hearing of dispositive motions, pretrial conference and
27 trial.*

28 The parties' proposed dates through the claim construction hearing are set forth in the

1 attached Exhibit A.

2
3 18. Trial

4 *Whether the case will be tried to a jury or to the court and the expected length of the trial.*

5 Both parties have demanded a trial by jury on all issues raised by the Complaint and
6 Counterclaim. At present, the parties believe that a realistic estimated length of trial is 3-6 days.

7
8 19. Disclosure of Non-party Interested Entities or Persons

9 *Whether each party has filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-16. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.*

11 Each party filed its Certification of Interested Entities or Persons (Plaintiff on April 14,
12 2014, and Defendant on June 27, 2014), and certified that other than the named parties, it had no
13 interested parties to report.

14
15 20. Other

16 *Such other matters as may facilitate the just, speedy and inexpensive disposition of this matter.*

17 The parties are not aware of any other matters that would facilitate the disposition of this
18 matter.

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20 21. Patent Local Rule 2-1(a) Disclosures

21 The disclosures required by Patent L. R. 2-1(a)(1)-(2) and (4) are included in the parties
22 Joint Case Management Statement. For Patent L.R. 2-1(a)(3), Plaintiff states that it does not
23 presently anticipate the need for live testimony at the claim construction hearing. All parties
24 expressly reserve the right to identify witnesses who might provide live testimony at the claim
25 construction hearing as permitted under Patent L. R. 4-3(e). Plaintiff proposes that it will present
26 first, followed by Defendant. Plaintiff estimates that the hearing will take no more than 3 hours.
27 Defendant cannot provide an objective and good faith estimate until it receives Plaintiff's
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disclosures and disclosure of which claims apply to which products and Plaintiff's proposed constructions of its claims. Depending on those disclosures, Plaintiff's estimate may be fair, or may be too short.

Dated: October 10, 2014

/s Michael J. Waters

Counsel for Plaintiff

Dated: October 10, 2014

/s H. Michael Brucker

Counsel for Defendant

CASE MANAGEMENT ORDER

The above AMENDED JOINT CASE MANAGEMENT STATEMENT, RULE 26(F) REPORT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:] The proposed schedule at Exhibit A is approved and shall be the case schedule through claim construction.

IT IS SO ORDERED.

Dated: October 14, 2014



UNITED STATES DISTRICT JUDGE

Exhibit A

<u>Case Event</u> <u>(Through Claim Construction Hearing)</u>	<u>Latest Permissible Date</u>
Parties exchanged initial disclosures.	August 14, 2014
Plaintiff serves its disclosures under Patent Rules 3-1 & 3-2.	October 16, 2014
Defendant serves their disclosures under Patent Rules 3-3 & 3-4.	December 1, 2014
ADR Telephone Conference	December 9, 2014
Parties to discuss ADR possibilities and conduct any agreed ADR process	December 2014-January 2015
Patent Rule 4-1 exchange of proposed terms for construction.	February 13, 2014
Patent Rule 4-2 exchange of preliminary claim constructions and extrinsic evidence.	March 6, 2015
Patent Rule 4-3 joint claim construction and prehearing statement.	March 21, 2015
Submission of Joint Case Management Statement	April 30, 2015
Discovery Cutoff – Claim Construction Issues	May 1, 2015
Case Management Conference	May 14, 2015
Patent Rule 4-5(a) – Plaintiff’s opening brief on claim construction	May 22, 2015
Patent Rule 4-5(b) – Defendant’s responsive claim construction brief	June 5, 2015
Patent Rule 4-5(c) – Plaintiff’s reply brief on claim construction	June 12, 2015
Claim Construction Hearing	July 17, 2015